



Review of Tauranga City Council

Performance of statutory functions under the Building Act 2004 with respect to the Bella Vista development



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Building System Assurance

Consumer Protection and Standards

Market Services Group

Ministry of Business, Innovation and Employment

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Abbreviations

BCA –	building consent authority
CCC –	code compliance certificate
IANZ –	International Accreditation New Zealand
MBIE –	Ministry of Business, Innovation and Employment
NTF –	notice to fix
PIM –	Project information memoranda
RFI –	request for information
RMA –	Resource Management Act 1991
TA –	territorial authority
The Act –	Building Act 2004
The Council –	Tauranga City Council

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Summary and key findings

In April 2018 Tauranga City Council (the Council) issued dangerous and/or affected building notices for all 21 homes in the Bella Vista development following serious concerns about their safety and their compliance with the Building Code. In June 2018 the Council voted to purchase all the properties from the homeowners, and it agreed a settlement with them in November 2018. At the time of writing this report, MBIE understands that the Council is in the process of repairing, relocating, salvaging, demolishing or remediating the houses.

This outcome represents a significant failure in the Council's building control system. Consequently, it has prompted the Ministry of Business, Innovation and Employment (MBIE) to review the Council's performance of its building control functions to assess why this failure has occurred, consider lessons to be learned, and identify any measures necessary to prevent similar failures happening again.

The Council has also conducted its own technical investigations and staff reviews, including commissioning an independent report by Hon Paul Heath QC (the Heath report) which concluded that the Council failed in the performance of its regulatory functions as a building consent authority (BCA).

MBIE's review concludes that there were a number of reasons for the Council's failure in the performance of its regulatory functions with respect to the Bella Vista development. Although the review has found there are areas where improvements to the existing processes and procedures are needed, the common theme is that the Council did not follow its normal processes and procedures in relation to the Bella Vista development and thereby the Council lost the benefit of the inherent safeguards, checks and oversight provided by those processes, in particular:

- Management intervened in and subverted normal Council processes. This was, in part, due to undue or inappropriate pressure from the developer.
- A single or main point of contact at the Council for the development meant that the escalation of concerns about the Bella Vista development did not occur as it should.
- The Council did not enter conditions on building consents or follow through on the need for third-party verification of compliance. For instance, where engineers were to carry out on-site inspections on elements of specific engineered design.
- The Council did not manage departures from building consents in accordance with the proper procedure once work was underway. For example, changes which clearly required an amendment to the building consent were dealt with as a minor variation³.
- The Council allowed building work to go ahead after earlier failed inspections had not been fully resolved, and it did not require building work to stop when critical documents such as 'producer statements' for third-party inspections were not provided.

¹ Refer to sections 121 and 121A of the Act for the meanings of dangerous building and affected building respectively.

² *Investigation and review: The Tauranga City Council's involvement with 21 properties in the Bella Vista subdivision*, 1 June 2018, Report of Hon Paul Heath QC

³ For MBIE's guidance, please see <https://www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/guidance-to-building-consent-amendments/>

- The Council did not utilise the enforcement powers granted to it by the Act to stop or require remediation of non-compliant building work when this was observed.
- The Council did not maintain proper records of its decisions and the reasons for decisions.

As a result MBIE requires the Council to undertake a number of actions, including:

- revision of some of its policies and procedures including its enforcement strategy, requesting critical documents such as 'producer statements' or the associated third-party inspection records before the affected building inspection or construction monitoring is undertaken;
- ensuring that staff are aware of, and enabled to, carry out their obligations in accepting building consent applications, understanding the distinction between minor variations and amendments to building consents, inspections and enforcement;
- submission of updated policies and procedures to MBIE within two months of receipt of this report.

MBIE will revisit the Council within the next six months, and require the Council to provide an update on progress to MBIE within the next 12 months. MBIE will also ensure that other councils and industry associations are aware of the review findings, and lessons learned.

As part of its review MBIE visited other Tauranga sites either under construction or which were developed at a similar time to Bella Vista. The purpose of this was to identify whether all, or most, of the contributing set of circumstances evident in the Bella Vista development failure were present elsewhere which might lead to a conclusion that there was a systemic issue within the Council. MBIE did not find evidence of a systemic issue, that is, it did not identify as part of its review other Tauranga sites either under construction or which were developed at a similar time to Bella Vista that had all, or most, of the contributing set of circumstances evident in the Bella Vista development failure. MBIE considers that the extent to which the Council has failed to perform across a number of its building control functions regarding the Bella Vista development, and ultimately the failure of the Bella Vista development, to be an isolated incident with a unique set of circumstances and does not represent a systemic issue.

OTHER SITES AND PROPERTIES CONSIDERED IN THE COURSE OF THIS REVIEW

MBIE reviewed some other housing developments processed around the same time as the Bella Vista development (2014-2017) and has visited some of those sites.

The review team also interviewed two homeowners unrelated to the Bella Vista development but whose homes were constructed in the same period. Those homeowners were aware the review was being undertaken and asked that their concerns about the Council's behaviour and issues with the Council's performance of certain building control functions arising out of the construction of their houses to be included in the scope of MBIE's review of the Council.

MBIE considers that some, but not all, of the issues which are identified in this report relating to the Bella Vista development were evident to some extent in those two cases, particularly with regard to:

- the Council's obligation to ensure it has sufficient information about matters such as siting, ground conditions (including third-party verification of those matters if applicable) before the applicable building inspection is conducted;
- following proper procedure to approve and document any changes to the building work;
- lack of appropriate enforcement action when the Council became aware of non-compliant building work.

Some, but not all, of MBIE's comments and conclusions in this report on why the Council has failed in the performance of a number of building control functions regarding the Bella Vista development are also applicable to the Council's oversight of these other two properties.

MBIE's role in conducting this review is not to make findings of fault in individual cases. Nor has MBIE reviewed the Council's technical decisions about compliance which in many cases are reviewable by determination⁴ under the Act.

MBIE notes that at the time of writing this report, the homeowners of the two non-Bella Vista sites visited have active determination applications with MBIE in relation to particular decisions of the Council, and other issues from those properties have been raised separately with the Council. Meanwhile, allegations against a number of individuals involved with the Bella Vista development are before the Courts or other statutory decision-making bodies.

⁴A determination is a legally binding ruling made by the MBIE about matters of doubt or dispute to do with building work. They are not for civil disputes or disputes about workmanship. Most determinations are applied for by building owners and councils, section 177 of the Building Act refers.

Acknowledgements

MBIE would like to acknowledge the homeowners, the Council's building services staff and contractors, and other individuals who were interviewed, for their cooperation and assistance during this review.

MBIE acknowledges that the Council, which has been under a new Chief Executive since September 2018, has been in the process of implementing changes and improvements to its policies and procedures since these issues came to light. It is also acknowledged many regulatory and building control staff (both senior and operational) have left the Council over the course of the failed development.

A complete list of the changes already put in place by Council and those proposed, has been provided by the Council and is provided in the section headed "Council's response to required actions". As noted on page 5 of this report, MBIE will work with the Council to review whether those changes, both implemented and proposed, are appropriate and/ or sufficient to address the issues identified by this and other reports (such as the Heath report), with further MBIE-lead reviews to occur in 6 and 12 months' time.



Figure 1: Locality of the Bella Vista development



Figure 2: Bella Vista development aerial photo

Purpose and process

PURPOSE

This review was initiated by MBIE using the monitoring powers available to the Chief Executive under the Act⁵ to consider the Council's actions with respect to the failed Bella Vista development. The review has examined how the Council performed its functions and exercised its powers under the Act and the regulations made under the Act⁶ in order to:

- identify how and why the Bella Vista development failed;
- establish whether there were similar problems occurring elsewhere in Tauranga at that time;
- consider any measures needed to prevent a similar failure occurring again.

MBIE's review has been informed by the June 2018 Heath report on the Council's actions but reaches its own conclusions. The Heath report identified failure on the part of the Council in the performance of regulatory functions and the need for further investigation into why the Council failed to perform its regulatory functions adequately, focussing on lessons to be learned in order to prevent similar issues occurring again.

The Council's actions under the Resource Management Act 1991 (the RMA) with respect to the Bella Vista development in some cases appear to have had an effect on the outcomes. Although MBIE does not administer the RMA, this review includes some comment about the effect of the RMA on building control outcomes. Relevant observations have been communicated to the Ministry for the Environment as the responsible agency for that Act.

NOTE 1:

This review focuses on the Council's performance of its functions under the Building Act. It does not make technical findings about Building Code compliance, the adequacy of individual building consents or code compliance certificates, or the competence of practitioners involved with the Bella Vista development.

A number of technical reports on the site and buildings at the Bella Vista development were commissioned by the Council (refer to the Heath report for more details). While some of their findings are referred to in this document, MBIE has not conducted any technical assessment of these reports and notes that some of those findings are being challenged by other parties through the Courts or other statutory decision-making bodies.

This document also includes background to the Bella Vista development and refers to issues that have arisen between the Council and some of those involved with the development. Nothing in this document should be taken as expressing a view on the merits of any claims that might be made by one against the other.

⁵ Under sections 204 and 276 of the Act

⁶ Including Building (Accreditation of Building Consent Authorities) Regulations 2006

MBIE'S ROLE IN IMPROVING BUILDING SYSTEM PERFORMANCE

As the central regulator of the “building regulatory system”, MBIE manages the system that regulates building work. This role includes overseeing the performance of the building regulatory system’s frontline regulators – BCAs and territorial authorities (TAs).

MBIE has three compliance objectives:

- Promote compliance
- Develop a picture of risk using monitoring and analysis
- Identify and respond to noncompliance.

The purpose of the BCA accreditation scheme is to provide MBIE with assurance that BCAs have the necessary procedures and systems in place to perform their building control functions, and that those functions are consistently and effectively implemented. MBIE appointed International Accreditation New Zealand (IANZ) to carry out regular monitoring in the form of two-yearly assessments which also look at such matters as quality assurance systems and staff capability, and observation of a sample of building inspections on-site.

IANZ assessments are conducted using a random sample of building consent files, and MBIE notes that no documents relating to the Bella Vista subdivision were reviewed or included in IANZ’s September 2017 accreditation assessment of the Council.

In addition MBIE also carries out technical reviews⁷ of Council functions from time to time, and responds to requests from Councils for assistance with particular issues.

Where non-compliance is identified (either by IANZ or through other means), MBIE expects that councils will move quickly to address any issues, taking into account the potential for harm. Where this does not occur immediately, MBIE utilises a number of different approaches to ensure that performance is improved, or the issue is otherwise addressed, depending on:

- How the issue was identified,
- The seriousness of the issue,
- Whether the issue is likely to be systemic, and
- The particular track record of the council.

Mechanisms for addressing non-compliance include:

- Varying the timeframes for monitoring and assessment programmes (which impacts on time and effort for individuals at councils),
- Additional monitoring, information requests and/or investigation,
- Providing support – from additional information to on the ground presence,
- Communication publicly about expectations and non-compliance identified,
- Removing accreditation or use of disciplinary powers (BCAs only), and
- Formal intervention (TAs or BCAs).

⁷ The last technical review of the Council was undertaken in September 2009 and its focus was on life-safety systems and building warrant of fitness matters.

PROCESS FOR THIS REVIEW

This review was conducted between August 2018 and March 2019 by members of MBIE's Building System Assurance team, supported by other regulatory and technical experts.

The review team met with staff at all levels and conducted interviews with past and present Council officers (including inspectors, processing officers, managers, as well as the former Chief Executive), technical consultants, the developer and other people external to the Council who were involved with the Bella Vista development, including owners of one home at their request.

The review team also visited the development and other Tauranga sites either under construction or which were developed at a similar time to Bella Vista. The purpose of this was to identify whether all, or most, of the contributing set of circumstances evident in the Bella Vista development failure were present elsewhere, which may have led to the conclusion that there was a systemic issue with the way the Council was performing its building control functions.

The review team considered relevant documentation including:

- the Tauranga City Plan and Infrastructure Development Code⁸
- Council policies and procedures (past and present)
- previous reports on the Council's performance including the Heath report⁹ and BCA accreditation assessments
- technical reports on the 21 Bella Vista buildings and sites, plans and specifications for these buildings and other related documentation including requests for information (RFIs), inspections, notices to fix, dangerous building notices (etc)
- documents relating to other Tauranga buildings and developments consented at a similar time, and plans and specifications for some of these buildings
- correspondence relating to the Bella Vista development and to other construction
- information provided by owners of other dwellings with potentially similar Building Code compliance issues.

⁸ Available at the Council's website www.tauranga.govt.nz

⁹ Also available at www.tauranga.govt.nz

Background

This section provides an overview of the Council's operations and construction environment at the time of the Bella Vista development, a brief description of the development and its houses, geotechnical and structural issues that were identified in various technical reviews, and conclusions from the Heath report. The Bella Vista timeline on page 19 of this report shows the key events that occurred.

THE COUNCIL AND CONSTRUCTION ENVIRONMENT AT THE TIME

Around 2015-17, at the time the Bella Vista development was underway, general levels of construction and development were on the rise, both in Tauranga and nationally. In Tauranga the number of building consents processed (for building work valued at \$5,000 and above) increased by about 40% a year from 2014 to 2016 before levelling off in 2017, while the total project values approximately doubled over that period. (An increase in the value of consented building work often represents an increase in the complexity of work being carried out.)

Year	Number of building consents issued	Value of consented building work
2014	1,964	\$463,444,446
2015	2,335	\$675,733,898
2016	2,743	\$764,356,844
2017	2,720	\$924,634,597

Note:

Figures computed from Stats NZ data, and exclude consents for building work valued at less than \$5,000.

Over this period the Council maintained efforts to recruit technical staff to keep up with demand. It also had contracts with external providers to help with processing of consents.

Demands on expertise were also significant at the time for those in the local construction industry including designers, engineers and builders. In addition, some of the new developments, like Bella Vista, were on steeper building sites (more marginal land) than previously developed for residential use and they presented some additional geotechnical and construction challenges. This was in contrast to other development in and around Tauranga over the past decade which had been on relatively flat land, such as at Papamoa.

In managing these developments, the Council was operating under the framework provided by legislation, including the RMA and the Building Act. It also had its own requirements contained in the Tauranga City Plan and Infrastructure Development Code.

THE BELLA VISTA DEVELOPMENT

The Bella Vista development is in Tauranga's southern suburb of Pyes Pa, on a sloping site above State Highway 36. This development, which contains 22 sections, was established by Bella Vista Homes Limited in 2015/2016 when it obtained 11 lots in the larger Lakes development.

Bella Vista Homes then obtained resource consents to subdivide each of these lots into two sections (one remained vacant) and carried out earthworks to create the sections and building platforms. The company also built the houses for each homeowner once they received building consent (these consents were issued progressively between June 2016 and August 2017).

Sixteen of the Bella Vista houses are located on Lakes Boulevard – eight adjacent to the road and the other eight on higher ground behind them, with an unretained cut slope of 2 – 6 metres high in between. These houses are all two storeys with partial basements, concrete masonry retaining walls at their rear, and timber-framed first floors.

The other five houses are on Aneta Way, further up the hill. These houses are one or two-storey with concrete 'raft' floor and foundations. There is an unretained cut slope of up to 6 metres in height between some of these houses and the Lakes Boulevard sections.

The houses were at varying stages of completion when Bella Vista Homes was put into liquidation in November 2017.

On 16 April 2018, the Council declared all 21 houses to be either dangerous and/or affected buildings.

In November 2018, the Council agreed a settlement to purchase all land and buildings in the Bella Vista development from the homeowners, and at the time of writing this report, the Council is in the process of repairing, relocating, salvaging, demolishing or remediating the houses.



Figure 3: View from 5 Aneta Way over houses at 307, 307A, 309, 309A Lakes Boulevard



Figure 4: Unretained section of soil which provides support to a dwellings external masonry wall

GEOTECHNICAL AND STRUCTURAL ISSUES THAT WERE IDENTIFIED

The Council commissioned several investigations of the Bella Vista development in late 2017/early 2018 from technical experts including structural and geotechnical chartered professional engineers and building consultants. These investigations, which contributed to the Council's subsequent decision to issue dangerous and affected building notices, identified a number of geotechnical and structural issues with the houses and sites.

The main issues identified by these investigations were:

- **Unretained, near vertical cuts** (ie no retaining walls protecting the land and buildings) resulting in erosion of the slopes between the Aneta Way and Lakes Boulevard properties and putting some properties at risk. Earthworks carried out behind/between various houses had created cut slopes of up to 6 metres high creating risk of collapse and subsequent damage to the houses.
- **Unstable land under the foundations** of some houses, including the possibility of voids. At least two houses were considered at risk of partial wall collapse.
- **Serious construction defects** in a number of the houses including problems with structural connections, cladding and drainage, and widespread non-compliance with the Building Code (particularly in relation to the Code's requirements for stability and durability). In issuing the dangerous and affected building notices the Council assumed that defects found after invasive/destructive testing in some houses were likely to be present in others not tested, and issued some of the notices on that basis.

REPRESENTATION OF THE BELLA VISTA DEVELOPMENT & THE COMMON ISSUES WITH CONSTRUCTION

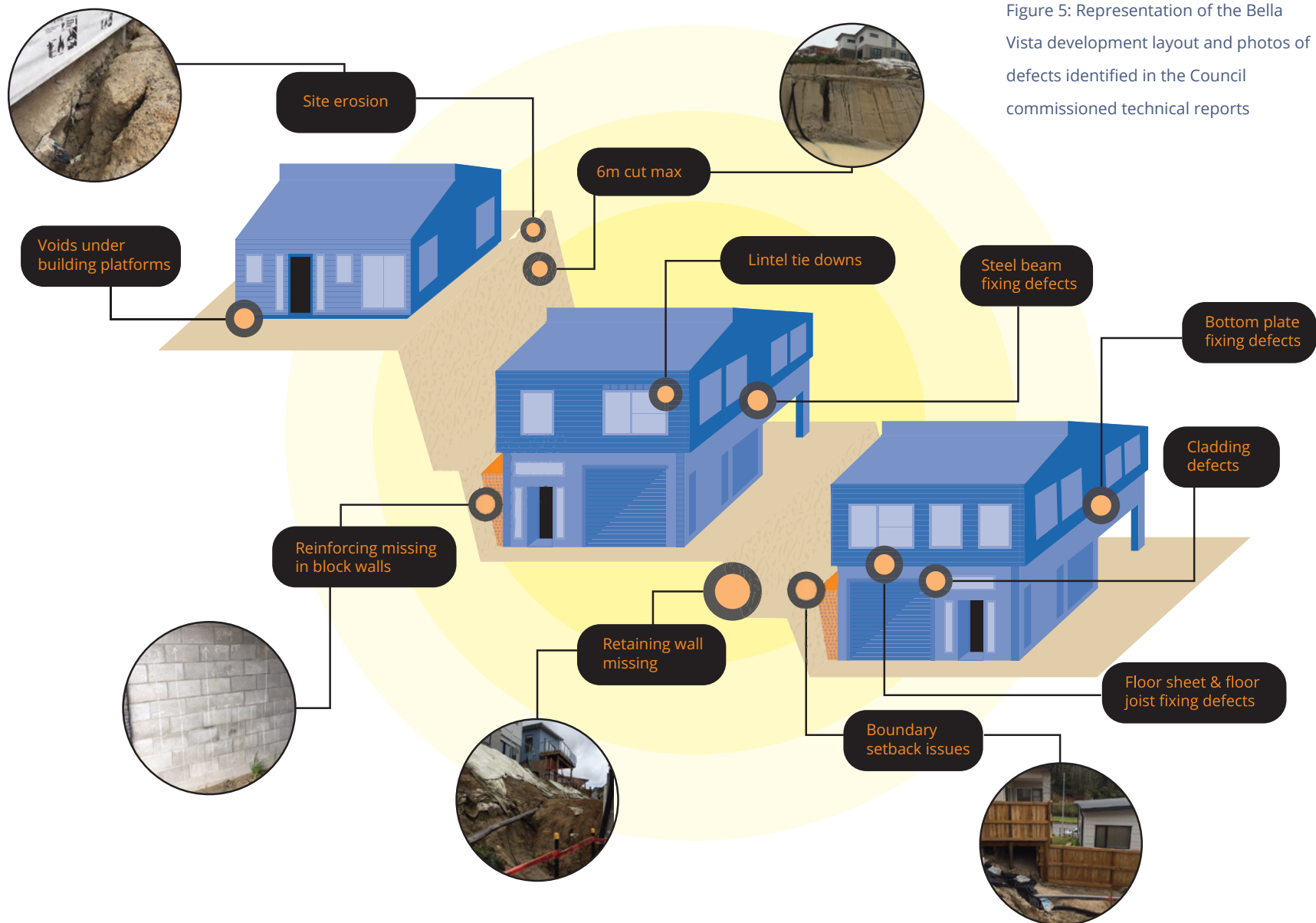


Figure 5: Representation of the Bella Vista development layout and photos of defects identified in the Council commissioned technical reports

THE HEATH REPORT

On 24 April 2018, shortly after declaring the Bella Vista houses as dangerous or affected buildings, the Council's Chief Executive commissioned Hon Paul Heath QC to investigate the Council's actions with respect to the development. The Heath report (Investigation and review: The Tauranga City Council's involvement with 21 properties in the Bella Vista subdivision) was published in June 2018 and concluded¹⁰:

- a. The Council dealt adequately with the resource consent applications made in respect of the Bella Vista subdivision.
- b. The Council did not perform monitoring and enforcement functions adequately in relation to geotechnical aspects of the intended construction works.
- c. The Council performed building consent functions adequately for those building consents issued before 23 December 2016 but failed to make appropriate inquiries in respect of those granted on or after that date.
- d. The Council did not perform its Building Act inspection functions adequately, in respect of both geotechnical and structural considerations.
- e. The Council ought not to have issued code compliance certificates for 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way.
- f. It was appropriate for the Council, on 16 April 2018, to declare all buildings in the Bella Vista subdivision either "dangerous" or "affected" or both, on the basis of the professional advice it received on or about 15 April 2018.

The Heath report recommended that the Council should take immediate steps to resolve its outstanding differences with homeowners. The report also recommended further investigation to ascertain why the Council had failed to adequately perform a number of its regulatory functions.

NOTE 2:

MBIE is satisfied that the Council's failure in properly performing regulatory functions is self-evident from the ultimate demise of the Bella Vista development and sees no reason to revisit Hon Paul Heath QC's findings.

Regarding the granting of building consents before and after 23 December 2016, Hon Paul Heath QC's view¹¹ was that building consents were not adequately processed after that date because officers did not have enough information to be satisfied on reasonable grounds that the building work could be undertaken in a manner that enabled all building work to comply with the Building Code.

MBIE understands Hon Paul Heath QC to mean that the Council should not have issued the consents without being satisfied that the timber retaining walls (to retain cut slopes at the development) would be built first.

With respect, MBIE does not agree with that interpretation of the responsibilities of a BCA when applying section 49 of the Act¹². It is MBIE's expectation that if the Council was satisfied that the work once completed would meet the Building Code, it was obliged to rely on the work being properly carried out i.e. by suitably competent and

¹⁰ Heath report paragraph 2

¹¹ Heath report paragraph 177

¹² Building Act section 49: Grant of building consent

NOTE 2 (CONTD)

experienced practitioners. In MBIE's assessment that shifts responsibility for the proper sequence of construction to the builder, although the Council's obligation to be alert to compliance issues, including the stability and safety of the buildings and sitework in terms of clauses B1- Structure and F5- Demolition and Construction Hazards of the Building Code also arose at the moment building work began on the site.



Figure 6: Example of an unretained cut along a property boundary of the Bella Vista Development.

BELLA VISTA EVENT TIMELINE

Figure 7: Bella Vista event timeline

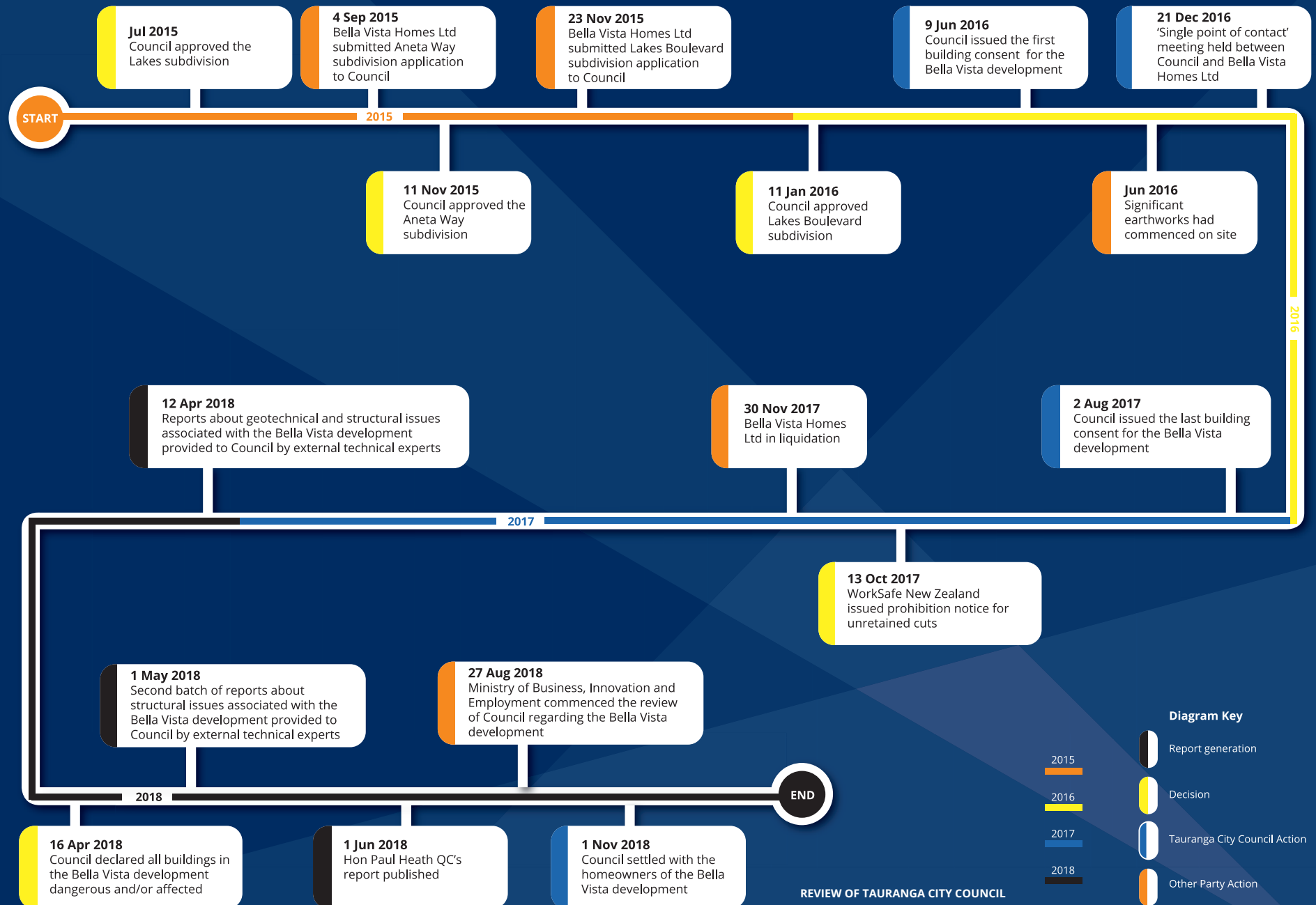




Figure 8: Large unretained cut slope below the Aneta Way properties.

Legislative requirements and BCA accreditation

The Council's role and functions as a BCA¹³ includes:

- processing building consent applications and granting building consents;
- inspecting consented building work; and,
- issuing code compliance certificate (CCC)s, notices to fix (NTFs) and compliance schedules.

The Council also has various responsibilities as a TA. These include following up on issued NTFs, issuing infringement notices if NTFs are not complied with, and issuing dangerous or affected building notices when it considers these are required.

Councils' roles and responsibilities under the Building Act include:

Building consents and building work:

- receiving and processing applications
- issuing consents for building work
- carrying out inspections of building work

Project information memoranda (PIMs):

- receiving and processing applications
- issuing PIMs to provide information about land and the requirements of other Acts that might be relevant to proposed building work on that land

CCCs:

- issuing certificates for work completed in accordance with the building consent

Enforcement:

- issuing NTFs to stop work if a site is unsafe or construction is not in line with the building consent
- issuing notices for buildings it considers dangerous, affected or insanitary to restrict the use of, and access to, these buildings
- issuing infringement notices for offences under the Building Act
- laying complaints about building practitioners that have not met their licensing obligations
- laying charges for offences under the Building Act and other related building legislation, for example, Resource Management Act.

The Act provides MBIE's Chief Executive with the powers to register persons as BCAs. The Act also requires them to hold a current accreditation from MBIE's appointed building consent accreditation body (which is currently IANZ).

¹³ Pursuant to section 12(1) of the Act

Sections 250 to 255 of the Act set the requirements for the accreditation of BCAs. The Building (Accreditation of Building Consent Authorities) Regulations 2006¹⁴ then set the criteria and standards an applicant must meet to be accredited as a BCA.

The following table describes the activities covered by these regulations.

Building (Accreditation of Building Consent Authorities) Regulations 2006	
Regulation	Description of activity
5	Requirements for policies, procedures and systems
6	Decisions under policies, procedures and systems
6A	Notification requirements
7	Performing building control functions
8	Ensuring enough employees and contractors
9	Allocating work to competent employees or contractors
10	Establishing and assessing competence of employees
11	Training employees
12	Choosing and using contractors
13	Ensuring technical leadership
14	Ensuring necessary technical resources
15	Keeping organisational records
16	Filing applications for building consents
17	Assuring quality
18	Requiring technical qualifications

MBIE developed and published guidance (available as an online tool¹⁵) to assist Councils with the BCA accreditation scheme. In addition to MBIE's guidance, the Council's building control staff use a quality systems manual¹⁶ to help them comply with their obligations under the Building Act and the regulations.

The manuals used by Council's staff at the time of the Bella Vista development were:

- Building Services Quality Manual (November 2015)
- Quality and Systems Manual (April 2017).

¹⁴ Available at www.legislation.govt.nz

¹⁵ Available at www.building.govt.nz/building-officials/bca-accreditation/detailed-regulatory-guidance

¹⁶ Developed by Councils and reviewed by IANZ and MBIE on a regular basis

ACCREDITATION AUDITS

Since 2006, IANZ has carried out biennial audits (“assessments”) of BCAs and accredited organisations. Note that if IANZ has concerns about a BCA’s performance, it can nominate and undertake assessments more frequently.

These BCA accreditation assessments are not intended to evaluate the performance of individual staff and are not comprehensive audits involving detailed examinations of all aspects of a BCA’s building control.

An assessment involves interviews with building control staff, and random sampling of building consent documentation to check for compliance in terms of whether the Council is performing its tasks in accordance with its own policies, procedures and systems, and also to check that those policies and procedures are fit-for-purpose and align with MBIE guidance and the regulations. Assessments also involve accompanying Council staff on inspections of consented building work.

BCA ACCREDITATION ASSESSMENTS DURING PROCESSING AND INSPECTING OF BELLA VISTA DWELLINGS

In late March 2016, the first two of 21 building consents had been applied for in the Bella Vista subdivision (2 and 5 Aneta Way). IANZ carried out an accreditation assessment in January 2016 and found a number of areas of general non-compliance, and the Council was required to carry out a number of corrective actions to address these issues.

At the Council’s request, the next BCA accreditation assessment was brought forward by several months to September 2017. MBIE notes that at this point in time all the building consents for the Bella Vista dwellings had been issued, and inspections were taking place for many of the dwellings.

The September 2017 assessment found a number of areas for improvement but no particularly concerning issues of non-compliance with regulatory requirements, with the result that IANZ recommended the next assessment be carried out in September 2019 (i.e. the usual two-yearly cycle). MBIE notes that none of the Bella Vista consent files were reviewed as part of either the January 2016 or September 2017 assessments because they were not captured within the samples reviewed at that time.

Reasons for failure in performance of building control functions

NOTE 3:

As mentioned earlier in this report, MBIE has a role in improving building system performance across the sector. To this end, this report responds to the question as to why the Council failed to perform a number of its regulatory functions adequately for the Bella Vista development. It does not make findings of fault in individual cases, or formally review the Council's technical decisions which in many cases are reviewable by determination under the Act.

1. MANAGING THE BUILDING CONSENT APPLICATIONS

Accepting and processing

BCAs are responsible for receiving and processing building consent applications. They are also required to provide public information about when a consent is required, how to apply, and what the BCA must consider before granting one.

BCAs must have policies and procedures for:

- receiving applications for building consents (under regulation 7(2)(b) of the Building (Accreditation of Building Consent Authorities) Regulations 2006)
- checking that applications comply with the requirements specified in the Building Act and any applicable regulations for consent applications (regulation 7(2)(c)), and
- if so, for entering, assessing, allocating and processing these applications as well as granting or refusing to grant building consents (regulation 7(2)(d)).

Once a BCA accepts a building consent application for processing, it must grant or refuse a consent within 20 working days. This does not include any time when the statutory clock stops; eg when the BCA has requested further information and is waiting for this.

BCAs must also have a system for assessing annually (or more frequently) the competence of employees performing building control functions. BCAs must also have a system for training the employees who perform their building control functions by doing a technical job.

At the time of the Bella Vista development, the Council often spread work from one developer across a number of processing staff, and also used external contractors to process consents.

This was initially the case for the early building consents in the Bella Vista development. Council staff told MBIE that such a practice provided safeguards and an assurance of better quality in processing. That was because different staff looking at similar applications from the same designer/ applicant would identify different issues or risks, which could then be discussed.

However, processing staff also told the review team that a number of the Bella Vista consent applications were inadequate in many respects and should not have been accepted for processing.

Ordinarily, BCA processing staff have discretion to refuse poor quality applications or those which are

incomplete or lacking particulars. However, following complaints from Bella Vista Homes that it was being unfairly treated and that the Council was effectively trying to put the company out of business, a single processing officer was made responsible for processing the remaining consents. This resulted in the processing officer being forbidden (or at least understanding that they were forbidden) from rejecting Bella Vista applications. The processing officer understood that direction to have come from senior management who would not generally have been involved in decisions about consent application processing.

It is also noted that processing times for these applications were long, with the average timeframe to issue a building consent for houses in the Bella Vista development being 135 calendar days¹⁷. In an interview, the developer told the review team that these delays resulted in construction on more sites needing to be started, beyond what was preferred, to ensure cashflow.

CONCLUSION 1:

It is not possible within the scope of this review and report to assess whether there is a causative link between the departure from normal process which occurred in this case and the failure of the Bella Vista development. However, it is clear that serious risks arise from allowing such a departure to occur.

Whatever arrangements are put in place to deal with individual applications for consent, it is MBIE's expectation that Council staff are supported by adequate safeguards, such as peer reviews, team meetings, internal audits, to ensure they are not put under undue or inappropriate pressure to action applications which would not normally be accepted or approved.

In this case the risks appear to have been exacerbated both by the pressure Council staff felt from senior management and also as a result of direct contact from the developer which staff said they found intimidating.

Conditions on the building consents

Building consents must be issued on Form 5 of the Building (Forms) Regulations 2004 and include (among other things) a description and location details of the proposed building work and any applicable conditions.

There are five conditions that can be placed on building consents. These relate to:

- inspections (under section 90 of the Act)
- waivers or modifications of the Building Code (section 67)
- natural hazards (section 72)
- building on two or more allotments (section 75)
- buildings with specified intended lives (section 113).

When deciding whether to grant a building consent a BCA should also specify a method for checking that the building work will actually be carried out in accordance with the consented plans and specifications.

BCAs usually stipulate a list of inspections in a building consent (as provided for in section 90), but there is nothing in the Building Act that requires BCAs to restrict themselves to inspections. A BCA may supplement or substitute these inspections with other measures to satisfy itself that the building work will be carried out in accordance with the plans and specifications. For example, this could include third-party oversight and statements (eg producer statements from chartered professional engineers for construction monitoring and oversight), project records, manufacturers' quality assurance plans, and the like.

¹⁷ While section 48 of the Act requires a Council to grant or refuse a consent application within 20 working days, the 'clock' stops when the Council needs more information from the applicant in order to reach a decision

The review team considered a number of the building consents issued for houses in the Bella Vista development. While as noted above conditions can and should be used on the form to prescribe the third-party verification needed, in the case of the Bella Vista houses this section was generally found to contain generic information. It did not contain site-specific details with respect to the level of construction monitoring that was required (for example) from chartered professional engineers or inspection of specifically designed building elements.

CONCLUSION 2:

Conditions on the building consents should have contained specific details about what information was required with respect to third-party inspections.

If particular building work is not to be inspected by the BCA, then there needs to be a clear understanding about who will provide assurance that the work has been properly completed. This can be achieved through a condition on the building consent or by other clear agreement between the Council and owner or their agent (as was attempted, but not followed through in some cases here).

MBIE expects that councils will stop the building process if they do not have verification in the form of a site notice, producer statement or other evidence.

2. INSPECTIONS AND MONITORING CONSTRUCTION

BCAs must have a system for assuring the quality of the performance of their building control functions and of the policies, procedures and systems required by the Building (Accreditation of Building Consent Authorities) Regulations (under regulation 17).

This quality assurance system must cover the procedure for identifying and managing conflicts of interest (regulation 17(2)(i)).

The Council's November 2015 Quality Manual contained a policy for identifying and managing conflicts of interest. This included review by the Team Manager and recording on the conflicts of interest register.

Single point of contact

In late December 2016, a meeting was held at Council offices between Bella Vista Homes management and the Council's Chief Executive, senior management and legal advisors¹⁸. MBIE understands the meeting was convened because of ongoing allegations made by the developer of unfair treatment and that the development was being impeded/obstructed by inappropriate actions of Council staff.

There were two main outcomes from this meeting. One was to appoint a "single point of contact" within the Council. The other was the Council's decision to commission a review of BCA/TA systems relating to customer service in response to allegations from Bella Vista Homes of unfair treatment. This resulted in the BDO report¹⁹ which, among other recommendations, endorsed the single point of contact approach.

While emails seen by the review team show that the appointment of a single point of contact was

¹⁸ As noted above at page 7, the Council has had a new Chief Executive since September 2018, after the commencement of this review. MBIE also notes that a number of staff and managers have changed roles or left the Council over this period.

¹⁹ BDO Final report dated June 2017: "Tauranga City Council- Review of Council's Building Services Department"

clearly and deliberately made, it appears that this decision received different interpretations by various staff who were unsure of its effect as the development went ahead.

A single point of contact was appointed to interact with the developer, but as it transpired, many Council staff were ultimately involved in inspections and other building control functions up until the Bella Vista development failed. The intention in December 2016 appears to have been to appoint a building inspector who was to be the developer's main point of contact with the Council and who was to carry out or oversee building inspections at the Bella Vista development.

Throughout interviews, the consistent view from staff sitting below senior management was that this decision was the most significant reason for the failure in Council functions with respect to the Bella Vista development. This is because it was the point in time when the checks, balances and safeguards provided by normal processes were set to one side, with practices emerging from the decision which were considered high risk.

Senior management interviewed by the MBIE review team did not appear to share the same concerns, considering the appointment to be at least capable of being managed in such a way as to avoid risk.

The key difference in the positions of senior management and other staff seems to have been that senior management considered the appointment should not have had the effect of setting aside safeguards and should not have been seen as a direction to do so, while staff "on the ground" interpreted the decision as removing their ability to escalate concerns through normal channels or take appropriate action. Other inspectors told MBIE in interviews of their concerns about practices on the Bella Vista sites after carrying out (and failing) inspections, saying they were unable to escalate those concerns in the usual manner because all decision-making was, as far as they were aware, being made by the main inspector.

Conflict of interest

Another issue that emerged was that the inspector selected by Council staff for the "single point of contact" role was having a house built by Bella Vista Homes at the time, opposite the Bella Vista development. It is understood that this potential for conflict of interest was disclosed to and known by the Council well before his appointment as single point of contact.

It is common for council employees, particularly building inspectors, to declare a conflict of interest where construction work is undertaken that employees have a financial interest in; eg the building of their own home. In normal circumstances, to mitigate the risk of conflict of interest, the employee would be removed from any decision-making relating to that financial interest.

CONCLUSION 3:

MBIE agrees that a single point of contact, or some form of case management, can provide benefits to both the customer and the councils. MBIE understands this is common practice across councils, particularly with complex commercial projects where it can be more difficult for another inspector to step in. However, MBIE expects safeguards to be in place to ensure council staff are supported in making normal and appropriate decisions about compliance of building work, and are not subject to pressure or influence (whether perceived or actual) from management or external parties.

MBIE interviews with staff showed considerable risk resulted from the appointment of a single point of contact and the way this was managed. For example, line managers told the review team they were cut out of the normal supervision of the staff member appointed as the point of contact; that senior management had taken over responsibility for their direct management. This is disputed by senior management, however the reality was that the main inspector's immediate supervisors considered (rightly or wrongly) that they were not able to review or question his decision-making. This appears to be a significant contributing factor to the failure of the Bella Vista development.

Regarding conflict of interest, the Office of the Auditor-General has useful guidance in this area for councils and other public entities: Managing conflicts of interest: Guidance for public entities²⁰, which should have been observed.

Managing construction sequencing

Clause B1 Structure of the Building Code requires due allowance to be made for the "effects of uncertainties resulting from construction activities, or the sequence in which construction activities occur" (Clause B1.3.4(c)).

The Building Code also requires that "sitework, where necessary, shall be carried out to: (a) provide stability for construction on the site, and (b) avoid the likelihood of damage to other property" (Clause B1.3.6).

The lack of timber retaining walls to support the cut slopes was a constant theme in discussions about the Bella Vista development and construction sequencing. As noted in the Heath report, it was the unsupported cuts and absence of these retaining walls which led to WorkSafe New Zealand issuing a prohibition notice²¹ which resulted in on-site building work coming to a halt.

The review team became aware from interviews that construction of the timber retaining walls was not part of the work the developer was contracted to carry out for the homeowners, even though the walls were critical to the integrity of the sites, and were included in the building consent applications and the issued consents. In interviews with the review team, inspection staff said they referred to the need for the timber retaining walls to be built as a matter of urgency. However it appears that the developer and builders did not have the ability to expedite this, as they were waiting for the owners to engage them or others to carry out that work.

MBIE also notes the developer's view, expressed in an interview with the review team, was that the houses needed to be in place before the timber retaining walls were built and there was adequate room for the equipment needed (including a digger) to build the timber retaining walls at any stage.

MBIE has not formed a view on, or attempted to reconcile, different positions on these matters. They fall outside the scope of MBIE's role which is to review the operation of BCAs and TAs.

However, MBIE expects that if the Council had known the timber retaining walls were excluded from

²⁰ www.oag.govt.nz/2007/conflicts-public-entities/part4.htm

²¹ Under section 105 of the Health and Safety at Work Act 2015. This notice prohibited any building work from continuing within two metres of the cut slope

contracts with homeowners (as the developer asserts but which was apparently not known to staff interviewed) this should have served as a further flag to Council to be alert to issues of compliance, particularly in terms of the safety and stability of the building and site works (Clauses B1-Structure and F5- Construction and Demolition Hazards of the Building Code) mentioned earlier in this report.

Council staff also suggested that changes in levels and locations of the buildings, which occurred during construction, would affect the heights and location of any future retaining walls, potentially causing additional loadings (ie surcharges) on some of the houses' existing concrete masonry basements. Such changes would also have potential effect on compliance with other Building Code requirements, for example the requirements of Clause D1 for access to the buildings (such as paths and driveways) and for the control of surface water (Clause E1- Surface Water). These were acknowledged by inspection staff in interviews as issues they knew would need to be addressed at some stage.

CONCLUSION 4:

Ensuring the appropriate sequencing of construction is always a key consideration. Particular care was needed at the Bella Vista development which was unusual in that the retaining walls spanning multiple properties were designed and consented on a per-allotment basis. As it transpired this would be further complicated by the fact that the developer had not been contracted to build the retaining walls.

While in Tauranga, the review team visited another development of approximately 30 sections that was under construction. In that case, as is common, all boundary retaining walls had been installed under a single building consent before the separate lots were created and houses built.

There are obvious benefits to such an approach, however MBIE also noted that a foreman on that site expressed frustration at the difficulty of obtaining sign-off for the retaining wall building consent in the absence of permanent fencing or barriers at the top of the retaining walls. Developers are reluctant to complete fencing, the style and cost of which is often a decision an owner wants to be involved in. If such issues (which are outside the scope of this review) are not resolved the risk emerges of more development similar to Bella Vista in that responsibility for and construction of retaining walls is an issue being dealt with on a per-lot basis.

As noted earlier, MBIE's view is that if the Council was satisfied the building work at the Bella Vista properties once completed would meet the Building Code, it was obliged to rely on this work being properly carried out by suitably competent and experienced practitioners in the correct sequence. In MBIE's assessment, the responsibility for the proper sequencing of construction was on the builder, but as soon as the Council became aware of difficulty in achieving proper sequencing of construction, an obligation would have arisen to take action to address non-compliance in terms of Clause B1-Structure or F5- Construction and Demolition Hazards of the Building Code (figures 4, 6 and 8 refers).

Minor variations versus amendments to the building consent

Building work that departs from the plans and specifications approved for building consent must either be dealt with:

- via a formal amendment to the consent under section 45 of the Building Act – this involves reapplying to the BCA so the building work can be checked for Code compliance, or
- as a minor variation (under section 45A) – the BCA can approve minor variations on-site if this is within the individual's capability.

A minor variation is defined in the Building (Minor Variations) Regulations 2009 as “a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates”. These regulations are for minor changes to construction. In general terms, these are changes which do not affect the level of Building Code compliance significantly but achieve the same outcome in a different way.

MBIE has provided guidance on building consent amendments and the distinction between amendments and minor variations²².

From interviews and documents considered during the review, MBIE identified that there was significant structural work undertaken at the Bella Vista development that was not included in the original building consents.

For example, a change to the consented building work at one Bella Vista house involved the underpinning of foundations (refer to Figure 9). This departure from the plans and specifications was approved as a minor variation on-site when clearly, given the significant structural implications for the building as a whole, it should have been dealt with through an amendment to the consent.

This would (and should) have required the owner to apply in advance of the work being carried out, with the Council considering an engineer's redesign of that section of the foundations and any other relevant information before making a decision about whether the building work would comply given the proposed changes.

²² At www.building.govt.nz – search “Guidance to building consent amendments”.



Figure 9: Foundation underpinning at an Aneta Way property. This was treated as a minor variation, but should have been processed as a formal amendment to the building consent.

From interviews with Council staff it appears that there were a number of reasons for the failures to follow proper practice when processing departures from building consents at the Bella Vista development. Comments included acknowledgements that the paperwork was sometimes lacking; that it was not a strong suit for some staff. Also, that matters were dealt with on-site as minor variations because the reality was that building work was not going to stop and needed to be dealt with pragmatically, especially as staff had been told to “make it happen”.

CONCLUSION 5:

Changes in the course of construction to building work approved in the consent create significant risk and require proper oversight and appropriate technical input. Also of critical importance is the need for changes to be proposed and agreed before they are carried out.

MBIE concludes that the lack of adherence to policies and proper practice at the Bella Vista development, at the very least, contributed to uncertainty about decision-making and, at worst, retrospectively approved changes to building work without proper assessment of whether the amended building work, or the building itself as a result, would comply with the Building Code.

Keeping adequate records of decisions

BCAs are required (by regulation 6) to record:

- decisions made under the policies, procedures, and systems required by the Building (Accreditation of Building Consent Authorities) Regulations – such as granting building consents, passing or failing inspections, and issuing code compliance certificates
- the reasons for these decisions
- the outcomes of these decisions.

Many councils include photographs in their records of inspections to provide additional certainty about their decisions and the reasons for them.

The review team found that many of the decisions recorded from inspections at the Bella Vista development were vague or incomplete. This has a number of potentially serious ramifications. For example, non-compliant building work picked up in an inspection might remain, and work continue, because the non-compliant work and the need for remediation is not adequately recorded.

Council staff noted that around the time the Bella Vista houses were being consented and inspected, the Council's computer software system for tracking building consent and inspection processes changed over from "GoGet" to "AlphaOne". Records had to be transferred between the two systems, which were not a direct match. MBIE understands this created real difficulty for staff, some of whom acknowledged they already struggled with the administrative tasks associated with properly recording inspections.

CONCLUSION 6:

Although it is not possible to draw a direct causal link between instances of failing to properly record decisions, and the failure of the development, given the many instances of non-compliant building work discovered at the Bella Vista development (albeit that some of those findings are disputed) MBIE concludes it is reasonable to infer a causative connection.

Recording decisions and the reasons for them is a basic requirement expected by MBIE. A failure in this regard seems most likely to be an issue to be dealt with through training, supervision and audit. This was recognised by some staff interviewed as an area where people were aware of the requirements, but resourcing and other pressures meant corners were sometimes cut and team leaders and supervisors were under too much pressure from various sources to devote sufficient time remedying this.

However, many staff also considered the failure of Bella Vista development a 'wake-up call' and expressed different ways in which systems were already being shored up to avoid future occurrences.

On-site inspections

The purpose of inspections is to make sure that building work is being carried out in accordance with the building consent (under section 90 of the Act).

Councils are not required to inspect building work, as evidence of compliance can be reasonably established in a number of different ways. For example, a PS4 (producer statement – construction review) provided by an engineer may be accepted as evidence that foundations have been properly completed.

When councils do carry out inspections they are required to have, and to follow, processes and procedures depending on the type of inspection, as well as having ongoing training to keep inspection staff up to speed on emerging issues/products/practices (refer regulation 7(2)(e)²³ on planning, performing and managing inspections).

When an inspection is failed the reasons for failure are to be recorded in detail. Following a failed inspection the builder is to rectify or complete the failed item/s, and the work either re-inspected or suitable evidence provided that this has been done.

During construction at the Bella Vista development, Bella Vista Homes engaged engineers and cadastral surveyors to inspect certain work and monitor construction in relation to structural aspects, such as masonry retaining walls and foundations, and siting and levels of the building platforms. In an interview with MBIE, the developer expressed his view that the Council had not been required to inspect foundations; that engineers had been engaged to perform that function.

Some consent files show fairly clearly the types of inspections the Council would not be undertaking because engineers were to monitor that part of the building work. On other consent files it was less

²³ Building (Accreditation of Building Consent Authorities) Regulations 2006.

clear. In any case, it seems that inspections of ground conditions, foundations and footings were carried out by engineer/s engaged by Bella Vista Homes as well as by the Council. As has been noted in a number of the technical reports commissioned by Council, the files where inspections were allegedly carried out by an engineer are lacking any documentary evidence of such inspection.

MBIE understands from interviews with some staff that Council inspectors relied on verbal confirmation from on-site Bella Vista Homes contractors that site and construction monitoring had taken place and that the particular professional had approved that aspect of construction. It seems that inspections and building work continued without formal confirmation from these professionals. It was also apparent from interviews and a review of the relevant process documents that this practice was common and that documentation such as 'producer statements' and the like were generally not sought or required to be provided until the final inspection or upon application for a CCC.

In MBIE's view, it is essential for a Council to establish that fundamental matters such as the location of foundations (in all three dimensions) are correct, especially on a site where even small variance in the location can have effects on Code compliance in a number of different respects. This must be confirmed before work progresses on to the next phase of construction. Second-hand verbal assurances that an engineer has monitored and approved building work or that a surveyor has established siting and set-out are clearly inadequate and do not provide reasonable grounds for a Council to satisfy itself as to compliance.

Instead, issues with siting and levels at the Bella Vista development only became apparent when many of the buildings were already at the framing stage.

This caused numerous additional redesign and consenting amendments and led to additional complexity on-site, including issues with increased surface water and driveways being too steep. There was also a cascading effect through the development; in particular, higher cuts were required and retaining walls had to increase in height.

While the majority of inspections were carried out by a single contact, it appears that most of the Council's inspection staff at the time carried out one or more inspections on-site over the course of the Bella Vista development. In interviews with MBIE, many staff expressed the view that building work they inspected on-site was poor.

However, it is evident from the documents reviewed and interviews carried out that the inspection process at least partially fulfilled its purpose of identifying non-compliant building work. A large number of inspections over the course of the development failed and were recorded as failures.

Given this, it is difficult to understand the many instances of non-compliant building work detailed in the various technical reports which have followed the failure of the development. MBIE expects that in the ordinary course of events, a failed inspection should result in the issue being rectified and re-inspected.

Accordingly, it seems the non-compliant building work which has been identified in various technical reports commissioned by the Council could only result from:

- a failure to properly follow up to ensure non-compliant building work was rectified before work proceeded
- a failure at an inspection to identify non-compliant building work
- work proceeding without inspection
- the failure of a third-party to identify/ flag non-compliant building work .

CONCLUSION 7:

MBIE concludes that if the Council had required critical documentation to be provided before construction continued, some of the significant issues onsite are likely to have been picked up and been able to be remedied in the normal course. MBIE expects the Council to put in place new procedures to deal with this issue, and understands that the Council has already done so.

3. ENFORCEMENT

Notices to fix

The Council (acting as a BCA) must issue a NTF if it considers on reasonable grounds that a specified person is contravening or failing to comply with the Act or regulations (under section 164 of the Act).

In the case of building work that is not being carried out in accordance with the building consent or that does not comply with the Building Code, the NTF will require the contravention to be remedied. The NTF can also require building work to stop until this happens.

If a NTF is not complied with, the Council (acting as a TA) can issue an infringement notice under the Building Act and can ultimately prosecute any offence if necessary.

The Council must have policies and procedures for issuing NTFs under regulation 7(2)(f)²⁴. Its November 2015 Quality Manual contained relevant requirements, including that "Complaints are investigated by the Team Manager, Inspections and/or a Senior Building Control Officer who determine if the matter requires a site visit and/or a Notice to Fix should be issued".

The Council subsequently developed a more extensive NTF policy for its April 2017 Quality and Systems Manual. This policy included determining whether any offence was major or minor, the process for issuing an NTF, who could issue such a notice, and the statutory requirements for doing so.

While sitework and construction were underway at the Bella Vista development there were many opportunities for Council staff to take corrective action using the enforcement tools available to them under the Act.

Aside from issuing an abatement notice under the RMA on 25 November 2016 (requiring Bella Vista Homes to install sediment controls), the Council did not issue any enforcement notices on-site under

²⁴ Building (Accreditation of Building Consent Authorities) Regulations 2006.

the Act until 22 December 2017, a month after Bella Vista Home was placed in liquidation. These were limited to eight NTFs – to the owners of 3, 5 and 6 Aneta Way and of 303a, 305, 307a, 309a, and 311a Lakes Boulevard – for non-compliance with Building Code clause F5 Construction and Demolition Hazards.

Staff informed the review team that they had wanted to take enforcement action much earlier than this. However, they said that NTFs were not commonly issued by the Council and that senior management would not allow them to issue NTFs on this development. This was denied by senior management.

In an interview, the developer expressed frustration at the fact that NTFs were not issued. The developer's view was that as he was not involved in the supervision or carrying out of the building work, he was not aware of many of the issues and relied on Council staff to take action when appropriate. He also told the review team that if the Council had issued NTFs requiring the installation of retaining walls, this would have provided valuable impetus for homeowners to address the building of the timber retaining walls, which in his view might have solved a lot of issues sooner.

The outcome of the 26 August 2016 site meeting, referred to earlier, was that Bella Vista Homes was instructed to engage a Category 1 geotechnical engineer²⁵ to oversee/confirm the significant geotechnical challenges on-site. This was done by way of an email of instruction from the Council to cease inspections to particular lots until the relevant information was received.

In interviews with the Council's technical staff, it became apparent that they had identified critical issues at various stages during construction (including after the August 2016 site meeting). These issues included non-compliance of building work, and building work not in accordance with the building consents.

In his report,²⁶ Hon Paul Heath QC considered the Council's reluctance to use the NTF procedure to address the issue of proper sequencing of building work. He understood the reluctance because on a literal interpretation of the statutory provisions "a conclusion that the procedure is unavailable [to address a case of sequencing of building work] could reasonably be reached". However, his consideration of the NTF procedure related only to the issue of the timber retaining walls and the fact they had not been completed first.

MBIE's view is that there were many opportunities to cause work to stop, or otherwise require remediation of defects, by the use of various tools up to and including an NTF. The council's NTF policy dated April 2017 provides that options such as site notices and issuing of NTFs are actions needing to be taken when officers become aware of "contravention" (non-compliance with the Building Code or work not carried out in accordance with the building consent).

²⁵ Tauranga City Council employs a category system to reflect geotechnical expertise.

²⁶ Heath report, paragraphs 215-216

CONCLUSION 8:

Some inspection staff interviewed expressed the view that the overarching reason for the development's failure was that "inspections failed, but work always continued". The reason for the Council's failure to carry out its statutory obligation to take action when aware of non-compliant building work appears, from interviews, to have been twofold: a culture across Council that NTFs are only to be used as a last resort, together with an understanding (on the part of building control officers dealing with the Bella Vista development) that work must be allowed to continue.

As noted previously, senior management interviewed rejected the idea that this approach was directed or endorsed by them. However, the fact is that a number of building control staff interviewed consistently expressed the view that action needed to be taken and that they considered (rightly or wrongly) they were unable to do so.

A variation of this issue was raised by the owner of one of the other properties interviewed (not being part of the Bella Vista development²⁷). In that case the Council purported to issue a "draft" NTF. Such a practice is clearly not in accordance with the Council's responsibilities when it is made aware of non-compliant building work.

MBIE concludes that the Council did not follow its own policies in relation to the enforcement of the Building Act. This is not acceptable. MBIE expects, and the Building Act requires, councils to follow their enforcement policies in all such instances.

Issue of dangerous and affected building notices

If a TA is satisfied that a building in its district is dangerous or "affected" (meaning near a dangerous building) it has various powers under the Building Act²⁶ which include to restrict access to that building. The notices issued for buildings in the Bella Vista development gave reasons for the Council's decision that each building was dangerous or affected, listed work which would need to be carried out, and provided that the buildings were not to be occupied until the danger was reduced or removed.

On 16 April 2018, the Council issued dangerous or affected building notices to owners of all 21 buildings in the Bella Vista development. On 20 April 2018, it lifted three of those notices after receiving further advice.

The Council's April 2017 Quality and Systems Manual contains a policy for managing dangerous, earthquake-prone and insanitary buildings albeit that this function is a TA function rather than a BCA function. It in turn refers to the Council's procedure document for the steps to be followed in the event concerns are raised about a dangerous, earthquake-prone, or insanitary building. MBIE notes that the policy and procedure documents are silent on how to treat "affected" buildings (which were introduced in a 2013 amendment to the Act).

Under the Council's own policy and procedures documents, a decision to issue a dangerous building notice can be made after assessment solely by Council building officers. In the present case, decisions to issue notices were made based on geotechnical and structural engineering advice in reports dated 12 April 2018, and legal advice as to interpretation of the appropriate test to apply.

²⁷ See above at page 9 "Other sites and properties considered in the course of this review".

²⁸ Refer sections 121-129 of the Act.

CONCLUSION 9:

Hon Paul Heath QC noted he was “required to assume the correctness of the conclusions reached in the 12 April 2018 reports”²⁹ and he considered, on the basis that the reports were correct, that it was appropriate and correct for the Council to declare the buildings dangerous.

Given these findings, MBIE considers there is no basis for further examination of whether the Council properly performed its TA function of issuing dangerous and affected building notices. While MBIE notes that some Council staff and others in interviews have expressed concern about the advice relied upon, it is not possible or appropriate within the scope of this review to examine from a technical perspective the integrity of that advice. A determination under the Building Act would be needed to establish whether the Council correctly exercised its powers in issuing the notices, and at the time of writing MBIE has not received a valid application from any of the potential parties to such a determination.

It is however possible to conclude that the Council was entitled to rely on advice from appropriately qualified and experienced practitioners, and took steps beyond those required by its policies and procedures to ensure the decision was as sound as possible.

²⁹ Heath report, paragraph 223.

Other observations: Planning issues

EARTHWORKS CONTROLS UNDER THE RESOURCE MANAGEMENT ACT (RMA) AND TAURANGA CITY PLAN

Although planning matters fall outside MBIE's responsibilities under the Act, one of the terms of reference for this review was to examine the interface between the RMA³⁰ and Building Act and how this may have affected outcomes at the development

At the time of the Bella Vista development the Tauranga City Plan's earthworks controls appeared to be largely focussed on sediment management and collapse of banks, and as a consequence there was little emphasis on size or volume rules for large earthworks apart from a general requirement that earthworks in excess of 5,000 cubic metres were required to have a Bay of Plenty Regional Council earthworks consent under the RMA.

During interviews with Council staff and following the review of Council policies and associated documentation, it became apparent to MBIE that there were limitations on the way Council staff could control and manage significant earthworks at the Bella Vista development.

Council staff were of the view they could not undertake adequate enforcement of the development either under the RMA or the Act in relation to the volume and extent of earthworks, including cuts. However, MBIE notes the Council did enforce some sediment control under the RMA, in November 2016.

As noted below in "Council's response to required actions" the Council has already taken steps to address these issues. On 16 November 2018, Council informed MBIE it was reviewing the Tauranga City Plan regarding geotechnical considerations at the time of subdivision and appropriate earthworks controls. In the interim, it was undertaking additional monitoring of unretained cuts and increasing public awareness about retaining cut slopes. As an interim measure to the City Plan change, it said it had also updated the Infrastructure Development Code to include a design standard for Infill (Secondary) Subdivision.

On 20 December 2018 the Council provided a further update on progress including details of controls at subdivision stage, the ceasing of its AC6 engineering approval process³¹, increased monitoring of land development, implementation of its producer statement guidance, initiation of an earthworks (City) Plan change, and industry communication.

³⁰ Certain parts of the Building Act interface with RMA requirements (eg section 37 of the Act requires a TA to issue a certificate concerning RMA compliance matters alongside the building consent).

³¹ The Council said its AC6 engineering approval process was set up some 10 years ago in response to market pressure, to enable building firms to start construction in new subdivisions before certificates of title had been issued for the new land parcels.

Required Actions

MBIE'S ACTIONS

As a result of this review, MBIE will:

- require a number of actions from the Council, and seek reporting from the Council on the implementation of those actions
- review the updated policies and procedures that Council are required to submit to MBIE within two months of receipt of this report
- undertake an on-site assessment to evaluate how changes have been implemented within the next six months
- require a further detailed update on progress within 12 months
- require actions by IANZ with regard to areas for focus in its next accreditation assessment scheduled for September 2019.

MBIE will also communicate the review findings and lessons learned with other councils and industry associations in line with its BCA/TA compliance strategy to engage with, educate and enable Councils to improve regulatory compliance.

ACTIONS TO BE TAKEN BY THE COUNCIL

The following required actions are based on the outcomes from this review.

In requiring these actions MBIE acknowledges that the Council has already undertaken a significant staff reorganisation, and initiated a Human Resources investigation, since the failure of the Bella Vista development and has already implemented a number of policy changes.

MBIE also acknowledges the Council's comments made in a letter to MBIE on 16 November 2018, while this review was in progress, that the outcome of the BDO report (an independent review into Council actions published in June 2017) "did result in changes to the structure of Building Services to better support stakeholder, customer and staff engagement; in-house delivery for training and audits; and a focus of growing leaders". The Council also said the BDO report had confirmed its BCA and TA functions to be technically competent.

Required actions to be taken by the Council:

1. Reviews policies and procedures and staff training with regard to vetting and accepting building consent applications
2. Develops policies and procedures regarding the need to identify critical measurements (eg boundary measurements, site levels and floor levels) and makes sure these are made a condition of the building consent where appropriate
3. Revises current policies and procedures to ensure critical documents are required for construction to continue (eg producer statements and other third-party verifications), rather than at the end of the project
4. Revises its "Form 5" (of the Building Forms Regulations) used for issuing building consents to make sure this clearly articulates when and at what stage in the construction process third-party verification is required
5. Implements further staff training to improve understanding of the difference between minor variations and amendments to a building consent
6. Establishes appropriate policies and procedures regarding case management (eg appointing a single point of contact) and handling of potential conflicts of interest, with regard to relevant guidance issued by the Office of the Auditor-General
7. Reviews policies and procedures and improves staff training with regard to records of decision-making to ensure these are adequate and appropriate
8. Reviews policies and procedures and improves staff training with regard to enforcement measures under the Building Act; in particular to ensure notices to fix are issued consistently and appropriately, and by suitably authorised persons. Immediately desist in issuing draft notices to fix

Required actions to be taken by the Council:

9. Reviews policies for laying complaints about licensed or registered practitioners that have not met their responsibilities
10. Strengthens the earthworks provisions within the Tauranga City Plan/Infrastructure Development Code in consultation with the Ministry for the Environment.

COUNCIL'S RESPONSE TO REQUIRED ACTIONS

As is routine in the preparation of a technical review of a Council's building control functions and in the preparation of this report, a draft was sent to the Council, the Ministry for the Environment, and International Accreditation New Zealand for comment. As part of its response, the Council provided the following list of actions already taken, and others proposed, to address MBIE's requirements. MBIE has not yet conducted any detailed assessment of the adequacy of the actions proposed or implemented, which will be reviewed as part of the process described above at page 39 for ensuring compliance with MBIE's required actions.

Action required by MBIE:

1. Review policies and procedures and staff training with regard to vetting and accepting building consent applications

Council response:

"This work is underway as part of Council Building Consent Authority (BCA) strategic review. Competency assessments have also been added to align with technical functions or processing inspections and code compliance"

Action required by MBIE:

2. Develop policies and procedures regarding the need to identify critical measurements (eg Boundary measurements, site levels and floor levels) and makes sure these are made a condition of the building consent where appropriate.

Council response:

"TCC will review existing processes and ensure that they are adequately robust as to incorporate into normal processing and inspection functions. This will include considering the interface between the Council BCA and wider monitoring functions under the Resource Management Act 1991"

Action required by MBIE:

3. Revise current policies and procedures to ensure critical documents are required for construction to continue (eg producer statements and other third-party verifications), rather than at the end of the project.

Council response:

"The draft Producer Statement Policy is currently under review with a view to implementation. This was also an aspect considered through the implementation of Alpha One"

Action required by MBIE:

4. Revise its "Form 5" (of the Building Forms Regulations) used for issuing building consents to make sure this clearly articulates when and at what stage in the construction process third-party verification is required.

Council response:

"Training is planned to ensure wording is appropriate to clarify what is needed and when from the applicant. This will include any changes needed to Form 5"

Action required by MBIE:

5. Implement further staff training to improve understanding of the difference between minor variations and amendments to a building consent.

Council response:

"Work is currently in progress and includes guidance to the public and also staff training"

Action required by MBIE:

6. Establish appropriate policies and procedures regarding case management (eg appointing a single point of contact) and handling of potential conflicts of interest, with regard to relevant guidance issued by the Office of the Auditor-General.

Council response:

"BCA processes around conflicts will be integrated into the wider organisational understanding, while consideration will be given to whether existing Council-wide conflict of interest procedures need updating"

Action required by MBIE:

7. Review policies and procedures and improves staff training with regard to records of decision-making to ensure these are adequate and appropriate.

Council response:

"Work on this has been ongoing and will continue. Training has taken place already and further training is planned to emphasise the importance and purpose of record keeping"

Action required by MBIE:

8. Review policies and procedures and improves staff training with regard to enforcement measures under the Building Act; in particular to ensure notices to fix are issued consistently and appropriately, and by suitably authorised persons. Immediately desist in issuing draft notices to fix.

Council response:

"The changes that were implemented following the BCA assessment in 2017 have improved understanding in this area and we will build on this work"

Action required by MBIE:

9. Review policies for laying complaints about licensed or registered practitioners that have not met their responsibilities.

Council response:

"Council's draft Producer Statement Policy has guidance on the circumstances when complaints to industry bodies are appropriate. Council has made a number of such complaints in recent years, and has been proactively recording below-standard work from practitioners to monitor trends and take action if warranted".

Action required by MBIE:

Strengthen the earthworks provisions within the Tauranga City Plan/Infrastructure Development Code in consultation with the Ministry for the Environment.

Council response:

"On 16 November 2018, the Council advised MBIE it was reviewing the Tauranga City Plan re geotechnical considerations at the time of subdivision and re appropriate earthworks controls. In the meantime, it was undertaking additional monitoring of unretained cuts and increasing public awareness re retaining cut slopes. As an interim measure to the City Plan change, it said it had also updated the Infrastructure Development Code to include a design standard for Infill (Secondary) Subdivision.

On 20 December 2018, the Council provided a further update on progress including details of controls at subdivision stage, the ceasing of its AC6 engineering approval process³², increased monitoring of land development, implementation of its producer statement guidance, initiation of an earthworks (City) Plan change, and industry communication".

³² The Council said its AC6 engineering approval process was set up some 10 years ago in response to market pressure, to enable building firms to start construction in new subdivisions before certificates of title had been issued for the new land parcels

Appendix A: Resources

RELEVANT LEGISLATION

Current versions of the following Acts and regulations are available at the New Zealand legislation website www.legislation.govt.nz:

- Building Act 2004
- Building Regulations 1992 Schedule 1 – the Building Code
- Building (Accreditation of Building Consent Authorities) Regulations 2006
- Building (Minor Variations) Regulations 2009
- Building (Forms) Regulations 2004.
- Resource Management Act 1991.

COUNCIL DOCUMENTS AND REPORTS

Relevant information at the Tauranga City Council website www.tauranga.govt.nz includes:

- Tauranga City Plan
- Infrastructure Development Code
- Heath report – Investigation and review: The Tauranga City Council's involvement with 21 properties in the Bella Vista subdivision, 1 June 2018, Report of Hon Paul Heath QC.
- BDO report dated June 2017: "Tauranga City Council- Review of Council's Building Services Department"

MBIE: BUILDING SYSTEM INFORMATION AND GUIDANCE

Refer MBIE's website www.building.govt.nz for information and guidance with respect to building system performance and the Building Act.

This includes detailed regulatory guidance for the BCA accreditation scheme at:

www.building.govt.nz/building-officials/bca-accreditation/detailed-regulatory-guidance

For information on minor variations to building consent follow this link:

www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/minor-variations-guidance/

OFFICE OF THE AUDITOR-GENERAL: GUIDELINES

Refer to the Office of the Auditor-General website www.oag.govt.nz for useful guidelines, including Managing conflicts of interest: Guidance for public entities.



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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**BUILDING
PERFORMANCE**

A decorative horizontal bar with a gradient from dark blue to light blue to yellow.

New Zealand Government

